
THE INTERIM

JUNE 2002

HELENA, MONTANA

VOL. XIII NO. 13

LAW AND JUSTICE COMMITTEE

Committee to Meet in June...The Law and Justice Interim Committee (LJIC) is scheduled to meet in Helena on Monday and Tuesday, June 3 and 4. Items on the agenda include: the regular reports from the Judiciary, the Attorney General and Department of Justice, and the Department of Corrections. Staff from the Montana Chapter of the American Civil Liberties Union will discuss the status of the settlement agreement in regard to Langford et al. v. Racicot. Additionally, representatives from Gallatin County will unveil a proposal for a cooperative "re-entry" program for Gallatin County. The program is billed as an innovative residential, treatment-oriented concept.

Proposed Legislation and Expenditure Reductions...The main focus of the June meeting will be the statutorily-required committee review of legislation that may be proposed by the Judiciary, including the Clerk of the Supreme Court, the Attorney General, the Department of Justice, the Department of Corrections, or any entity attached to any of these departments.

Beyond the statutory requirement to conduct the review, there are several purposes for the preview, including providing a "heads up" to legislators and interested persons of possible statutory changes. The reasons underlying the proposals can vary, but may result from court decisions, changes in federal law, program efficiencies, deficiencies, enhancements or reductions, budget considerations, administrative prerogatives, or a variety of other factors. The review process will involve only a very general description of the proposed legislation. Actual drafts of bills will not be presented or available. The committee may take action to allow the bill to be formally "requested" under established procedures, which will allow Legislative Services Division staff to assign an "LC" number to the request and eventually begin drafting the proposal.

On the matter of potential legislation, the LJIC will revisit and possibly act on any proposal from LJIC members to revise, including adding or repealing, statutory provisions related to the sentencing or corrections policy of the state. These policies are the primary focus of the interim study requested in House Joint Resolution No. 39 (2001).

A secondary focus of the meeting will be to hear briefings from the Departments

of Justice and Corrections and from the Judiciary regarding the budget director's request for spending reductions for fiscal year 2003. The budget director has requested state agencies to identify general fund reductions at the 3% and 10% levels and may expand to a 4% level as well.

General Information...Interested persons can get the most up to date details for the LJIC by calling the LSD at (406) 444-3064 or by referring to the committee's website at <http://leg.mt.gov> and following the links.

For more information about any of the committee's activities, contact Dave Bohyer by phone at (406) 444-3064 or by e-mail at dbohyer@mt.gov, or LJIC Chairman Rep. Gail Gutsche in Missoula by phone at 406-728-0566.

ENVIRONMENTAL QUALITY COUNCIL

Environmental Quality Council...The EQC met in May and received a number of interesting updates. The Public Service Commission staff and NorthWestern Energy's legislative liaison reported on the PSC's contested case hearings on the default electricity supply portfolio. The default supply portfolio consists of electricity supply contracts that NorthWestern Energy (formerly the Montana Power Co.) has negotiated to supply roughly 280,000 customers over a five year period starting July 1, 2002 and ending June 30, 2007. The PSC is required to establish default electricity supply rates. In establishing those rates, the PSC must make a determination as to whether the costs associated with the electricity supply contracts that NorthWestern negotiated were prudently incurred. The PSC will make a decision on or before May 31, 2002, on whether to accept or reject all or some of the supply contracts within the portfolio.

Dennis Lopach, NorthWestern Energy's legislative liaison, told the EQC that legislators should consider whether competition would ever develop for small residential and commercial customers and whether the electricity supplied to those types of customers should be reregulated. Lopach said that NorthWestern Energy had not taken a formal position on reregulating energy supply for small residential and commercial customers, but that it was an issue that policymakers should begin to think about.

Staff told the EQC that the Legislative Finance Committee has decided to forego additional work on the HJR 42 study of funding alternatives for the Department of Natural Resources and Conservation's fire management program, including wildfire suppression costs. Reports on fire suppression costs may be found on the Legislative Fiscal Division webpage at <http://leg.mt.gov/fiscal/reports.htm>

Jim Volberding, Canyon Resources, Pat Platenberg, DEQ, and Stephanie Shammel, area landowner and rancher, discussed the status of the reclamation and closure of the C.R. Kendall mine near Lewistown. Mining at the open-pit, heap-leach gold mine stopped in 1995 and the processing of ore ceased in 1998. Since then, the state and the mining company have been struggling with water quality violations, implementation and amendment of reclamation plans, bonding issues, and spring and stream dewatering

concerns. Canyon Resources, the parent company of C.R. Kendall, is responsible for closure and reclamation of the mine.

Council Actions: At the request of the Agency Oversight and MEPA Subcommittee, the EQC sent a letter to the governor regarding methamphetamine lab cleanup standards. The EQC also sent a letter to the Fish, Wildlife, and Parks Commission regarding that agency's use of an exception to the Montana Administrative Procedures Act when adopting seasonal recreational rules on lands and waters controlled by the department. The Council voted to urge DEQ to permit development of portions of the property at the former Missoula White Pine Sash soil and ground water remediation site provided that there are no environmental concerns with the segregated parcels.

The Long, Hot Summer: The EQC's next scheduled meeting is Tuesday, July 30. EQC subcommittees are scheduled to meet on Monday, July 29. Subcommittee activities are set out below.

Minutes from previous meetings, EQC and subcommittee work plans, agendas, and press releases may be found on the EQC website at <http://leg.mt.gov/services/lepo/index.htm>. If you have any questions or would like additional information or to be placed on the EQC interested persons mailing list, contact the EQC office at (406) 444-3742 or mtheisen@mt.gov

Energy Policy Subcommittee ... The EQC Energy Policy Subcommittee met on May 8. The subcommittee heard some excellent presentations from Sen. Ken Toole (initiative sponsor), Jim Driscoll (Energy Producers Against Private Property Confiscation), and Jeff Martin (Legislative Services Division) on the proposed initiative (I-145) to purchase hydroelectric generation facilities. The subcommittee spent a lot of time asking questions on the potential property tax implications of the proposed initiative. Martin's report on the property tax implications of the proposed initiative is on the subcommittee website at <http://leg.mt.gov/services/lepo/subcommittees/energysub.htm>

Subcommittee staff presented a legal analysis of the implications of voter rejection via referendum of House Bill 474, the law adopted at the end of the 2001 legislative session that generally revised electrical industry restructuring. The legal opinion is also available on the subcommittee website. The subcommittee reviewed two subcommittee energy publications: *The Montana Electricity Law Handbook* and *Understanding Electricity in Montana*. These two educational publications will be put out for a 30 day public comment period in June. The subcommittee will meet Monday, July 29 to review and incorporate the public comments into the publications. For more information contact Todd Everts (406) 444-3747 or teverts@mt.gov

Agency Oversight/MEPA Subcommittee... The Agency Oversight/MEPA Subcommittee met May 8 in Helena. Monte Mason (DNRC), Russ Gowan (Helena Title and Abstract), Jefferson County Clerk and Recorder Bonnie Ramey, and former Billing's Sen. Tom Keating, gave the subcommittee a crash course on filing and recording mineral rights in Montana. The subcommittee was concerned about how a surface owner would know if the mineral rights had been severed from the property and, if so, who owned or

may have leased them. Landowners in the Bozeman Pass area were surprised to learn that the mineral rights to their property had been leased for possible coal bed methane development. Records are available at county clerk and recorder's offices and through property abstracts but are sometimes difficult and expensive to retrieve.

A panel of project applicants addressed the issue of MEPA environmental impact statement (EIS) costs. Representatives from Cenex, ASARCO, Continental Energy Resources, and Stillwater Mining presented their perspectives on the cost of preparing environmental review documents. In addition to paying for most or all of the EIS costs according to a statutory formula, applicants also incur costs in developing information and engineering necessary for both the EIS process and the permit application process. Although most applicants agreed that the MEPA process produced a better project, they also said that they have little control over the costs or the schedule for preparing the environmental analysis.

The subcommittee reviewed two draft brochures intended to solicit public comments and participation in response to MEPA environmental analyses. The drafts will be circulated to agencies and interest groups for review and comment. A final revision will be available for use by state agencies and the public.

The cleanup of property contaminated by illegal methamphetamine labs is becoming a problem for owners of residential, rental, and storage properties in Montana. A panel from the Department of Justice, DEQ, the state auditor's insurance office, and the Montana Landowners' Association provided a status report on the state response to meth lab cleanup concerns. At the subcommittee's recommendation, the EQC sent a letter to the governor asking that the appropriate state agencies develop cleanup standards for meth labs and provide guidance to assist property owners.

A DEQ report on staffing and turnover within the Remediation Division shows that the bureau responsible for overseeing cleanup of nonfederal, nonmine hazardous waste sites is operating at about 75% staffing because of retention and recruitment problems and because of agency efforts to utilize vacancy savings to retain experienced staff. Prior testimony this interim indicated that cleanup and redevelopment plans and projects have been adversely impacted by staffing difficulties at DEQ.

Subcommittee Actions: The subcommittee sent a letter to the Petroleum Tank Release Compensation Board asking if it needs a temporary 1/4 cent increase in the per gallon fee on fuels that finances the fund to partially compensate cleanup costs for fuel storage tank releases. In February the subcommittee learned that fund expenses are exceeding revenue because of a backlog of claims resulting from the federal government's 1998-1999 deadline for removal or upgrading of underground storage tanks. (See the March 2002 issue of **THE INTERIM** for prior coverage).

The subcommittee voted to change the timing and content of the biennial compliance and enforcement reports that are provided to the EQC by the Department of Agriculture, DEQ, and the Department Natural Resources and Conservation. A bill draft

to clarify the oversight authority of the EQC was reviewed and referred to the EQC.

For more information about the subcommittee's activities go to the EQC website or contact Larry Mitchell, subcommittee staff, at (406) 444-1352 or by e-mail at lamitchell@mt.gov.

Coal Bed Methane/Water Policy Subcommittee . . . The subcommittee met May 8 and 9 in Helena. Chris Tweeten, chair, Montana Water Rights Compact Commission, provided a brief background and history of the commission and discussed ongoing and completed water rights compacts in Montana. The commission is negotiating settlements on reserved water rights with several Indian tribes and with federal agencies such as the U.S. Fish and Wildlife Service and the U.S. Forest Service. Montana's system of negotiating settlements is much quicker than going through the court systems as many other states do; the state's system is regarded as a process that works well.

Tom Reid, supervisor, Water Quality Discharge Permits section, DEQ, discussed the draft general permit for coal bed methane produced water. DEQ issued the draft permit for public review last February. Five public hearings were held and the deadline for written comments was May 15. A final permit will not be issued until the statewide environmental impact statement (EIS) for coal bed methane development in Montana is completed and the record of decision has been signed.

The proposed general permit would only address discharges of coal bed methane water in off-drainage impoundments for the purpose of livestock or wildlife watering. Discharges of coal bed methane water in state waters would be regulated through a different permit. The proposed permit would not authorize the drilling of coal bed methane wells or the construction of impoundments. These activities are regulated by the Montana Board of Oil and Gas Conservation.

The draft statewide EIS for coal bed methane development in Montana was also released in February. Six public meetings were held and comments were due May 15. Representatives of the three lead agencies responsible for preparing the draft EIS briefed the subcommittee and answered questions. The final EIS is expected to be completed by August 2002.

Sen. Cole, Sen. Tester, and Sen. McCarthy reported on their meeting with DEQ regarding the development of TMDLs in Montana. A copy of the minutes from that meeting are available on the EQC website (March 25, 2002).

Staff reviewed two memorandums. One summarized the status of other coal bed methane studies and activities and the other summarized the Montana Supreme Court decision in Bitterroot River Protection Association, Inc. v. Bitterroot Conservation District, 2002 MT 66. The memorandums are available on the subcommittee's web site.

Subcommittee to Meet in July: The next subcommittee meeting will be July 29 in Helena. For more information, contact subcommittee staff:

Coal Bed Methane --Mary Vandenberg at (406) 444-5367 or by e-mail at

mvandenbosch@mt.gov.

Water Policy -- Krista Lee Evans at (406) 444-3957 or by e-mail at kevans@mt.gov.

EDUCATION AND LOCAL GOVERNMENT COMMITTEE

Committee Completes Public Hearings... The Education and Local Government Committee has completed its statewide public hearings on the school funding recommendations developed by the Governor's Advisory Council on Public School Funding. Hearings were held in Shelby, Great Falls, Lewistown, Miles City, Wolf Point, Billings, Butte, Stevensville, and Kalispell. Between 40 and 70 people attended each hearing to voice their support for or opposition to the recommendations as well as express their concerns for the future of public education in Montana. The committee will review all of the comments and prepare a report of its findings and recommendations to Governor Martz.

HJR 41 Subcommittee Meets Around the State... The HJR 41 Subcommittee held meetings around the state in conjunction with the school funding public hearings. The subcommittee met in Great Falls, Miles City, Billings, and Kalispell. HJR 41 is a study of territory transfers between school districts. In December 2000, the Montana Supreme Court declared that the current law granting county superintendents the power to transfer territory is an unconstitutional delegation of legislative power because the law is too broad and lacks specific criteria to be considered when deciding to grant or deny a petition for transfer. The subcommittee has been looking at two areas: requirements for a petition to transfer territory and criteria to be used by a county superintendent in making the decision. The subcommittee will make its final recommendations this summer and present them to the full committee sometime before Sept. 15.

To Meet in July... The committee will meet in mid-July in Helena to develop its school funding recommendations to the governor, review legislation being proposed by the state agencies under its subject matter jurisdiction, and discuss the state assumption of district courts. For further information regarding the July meeting or other committee activities, please contact Connie Erickson at (406)444-3064 or by e-mail at cerickson@mt.gov. Information on the meeting will also be available on the committee's website at <http://leg.mt.gov> and following the links.

LEGISLATIVE REFERENCE CENTER

I recently had the opportunity to combine two of my favorite things, Elvis and libraries, into a program for the Montana Library Association annual conference, held in Great Falls. My program, "Learning Ready Reference Skills With Elvis" involved five librarians from across Montana; each from a different type of library -- public, academic, school, medical, and legal and legislative. Each librarian presented Elvis the Reference

Librarian with a question commonly asked in his or her library. With an uncharacteristic lack of skill, Elvis the Librarian was unable to answer the question properly, leading the librarian into the substance of his or her presentation. Some excellent Internet research resources were illustrated by the talented cast of Elvis players. The presentations (and photos!) can be found on the Montana Library Association website at <http://www.mtlib.org/conf/presentations/elvis/elvis.html>.

My part of the Elvis program revolved around legal and legislative research resources. Because many of the research materials in these areas are well-suited for placement on the Internet, most of my presentation was geared toward online research resources, free and available to all. Below is a list of some very helpful Internet resources that may be used as starting points for legal and legislative research. Sources of legal information include, among others, statutes, case law, rules and regulations, Constitutions, bills, and secondary sources.

Statutes

Federal: U.S. Code: <http://www4.law.cornell.edu/uscode/>
 Montana: MCA: <http://leg.mt.gov/services/legal/laws.htm>

Case law

Federal: U.S. Supreme Court Opinions: <http://www.findlaw.com>
 Federal Court Opinions: <http://www.uscourts.gov>
 State: Montana: <http://www.lawlibrary.mt.gov>
 Other States: State Court Locator: <http://vls.law.vill.edu/Locator/statecourt/>

Rules and regulations

Federal Code of Federal Regulations (CFR) <http://www.access.gpo.gov/nara/cfr/>
 State ARMs <http://www.umt.edu/lawinsider/library/lawbyjur/arm.htm> (not available in their entirety online)

Constitutions

Federal: U.S. Constitution <http://www.law.emory.edu/FEDERAL/usconst.html>
 State: Montana Constitution <http://leg.mt.gov/services/legal.const.htm>

Bills

Federal: Thomas: <http://thomas.lov.gov>
 State: Montana: [http://laws.leg.mt.gov/pls/laws01/LAW0200W\\$.startup](http://laws.leg.mt.gov/pls/laws01/LAW0200W$.startup)

Secondary Sources

Dictionaries: <http://dictionary.law.com>
 Encyclopedias: <http://www.nolo.com/lawcenter/ency/index.cfm>

Directories:

Lawyers: <http://www.martindale.com/locator/home.html>
 U.S. Congress: <http://congress.org/congressorg/dbq/officials/directory/directory.dbq?command=congridir>
 MT Legislature: http://leg.mt.gov/online_publications/laws/57th/legname.htm

Legal Forms: <http://www.umt.edu/lawinsider/library/mtforms.htm>
<http://forms.lp.findlaw.com/>
<http://www.lectlaw.com/form.html>
<http://www.washlaw.edu/legalforms/legalforms.html>

You should always judge the accuracy of any information you get from the Internet. Use the ACT Test to evaluate the quality of the information you receive: A=Authority; C=Contact Information, T=Timeliness.

You now know more than Elvis when it comes to Internet legal and legislative research. You sure ain't no Hound Dog!

For more information on these sites, Elvis, or any other information research need, please contact Lisa Mecklenberg Jackson at (406) 444-2957 or at ljackson@mt.gov.

LEGISLATIVE FINANCE COMMITTEE

Committee to Meet in June... The Legislative Finance Committee (LFC) will meet on Thursday, June 13 and Friday, June 14 in Room 303 of the Capitol (the old Supreme Court Chamber) at 8 a.m. each day. An agenda for the meeting can be found on the Legislative Fiscal Division (LFD) website at <http://leg.mt.gov/fiscal/index.htm>. On June 13, the committee is expected to review spending reduction plans that have been proposed by the governor's budget director in response to the projected general fund shortfall for the 2002-03 biennium. LFD staff has spent considerable time reviewing these plans and will present their analyses of the plans to the LFC. Section 17-7-140, MCA, requires that the governor implement spending reductions in the event of a projected general fund budget deficit. The statute also provides that the LFC may make recommendations to the governor concerning the proposed reductions.

The second day of the meeting is expected to cover several topics, tentatively slated to include:

- Potential agency cost over-runs/supplemental requests
- Analysis of Pay Plan 20 (broadbanding) budget impacts
- Vacancy savings/personal services budgeting methodology
- Access to MUS accounting data: SABHRS vs. BANNER
- District court financing
- Information technology management update
- Final report/recommendations of SB 162 Subcommittee on revenues dedicated to local government
- Subcommittee reports regarding the POINTS system and the HJR 1 study of public mental health services

If you need further information, check out the LFD website or contact Clayton Schenck at

cschenck@mt.gov or at (406) 444-2986.

SB 162 Subcommittee on Revenues Dedicated to Local Government...The subcommittee will meet on Wednesday, June 12 in Room 137 of the Capitol, beginning at 1:15 p.m. The subcommittee will discuss the recommendations to be included in the final report and will assess the review process and consider an alternative to the subcommittee review that was established in SB 162. Subcommittee members are Sen. Zook (Chairman), Sen. Nelson, Rep. Forrester and Rep. Kasten. For further information, contact Jon Moe at jonmoe@mt.gov or at (406) 444-4581. Information about the subcommittee's activities can be found on the LFD website under the link for subcommittees.

JOINT SUBCOMMITTEE ON POSTSECONDARY EDUCATION POLICY AND BUDGET

Accountability Measures Reviewed...Accountability measures that evaluate the attainment of statewide public postsecondary education policy goals were the main topic of discussion at the May 17 meeting of the Joint Subcommittee on Postsecondary Education Policy and Budget (PEPB). The six policy goals and the associated accountability measures tentatively identified are summarized below:

POLICY GOAL #1 Prepare students for success through quality education

- Retention rates
- Completion rates
- Professional certification results
- Student faculty ratios/class size

POLICY GOAL #2 Promote access and affordability

- Affordability compared to other states (tuition and fees, state financial aid provided)
- Participation rates (traditional and non-traditional students)
- State support as a percent of personal income
- Student debt load and loan default rate
- Distance education offerings and participation rates

POLICY GOAL #3 Deliver efficient, coordinated services

- Transferability among institutions
- Expenditures per student FTE
- Percent of expenditures in instruction, administration, athletics, etc.
- Degree productivity per year

POLICY GOAL #4 Be responsive to market and employment needs and opportunities

- Job placement rates by college
- Average starting salaries of graduates by college

- Percent of resident graduates who stay in the state
- Number of people participating in workforce training programs
- New programs tied to market employment needs
- Private sector-university financial partnership

POLICY GOAL #5 Contribute to Montana's economic and social success

- R&D receipts/expenditures
- Technology transfers (licensing and commercialization)
- Program demand vs. capacity
- Number of businesses served by university system
- Number of community service programs

POLICY GOAL #6 Collaborate with K-12 school system and other postsecondary education systems

- Average SAT or ACT scores of first-time, full-time freshmen
- Demand for remedial classes by first-time, full-time freshmen
- Number of first-time, full-time freshmen that have taken advanced placement courses
- Number or percent of Montana high schools that have aligned graduation requirements with Montana public postsecondary education entrance standards
- Collaborative programs with other postsecondary education institutions

The Subcommittee requested feedback from the Montana University System regarding the availability of the data required for the accountability measures and suggestions for alternative accountability measures.

Final Meeting Set for July 9...The PEPB will wrap up its interim work in July. Agenda items include finalizing public postsecondary education accountability measures to recommend to the next legislature, and reviewing draft legislation that would establish a statutory committee to conduct an ongoing review of the statewide public postsecondary education policy goals and accountability measures.

The subcommittee will meet at 10 a.m. on July 9 in Room 102 of the Capitol. For more information about the meeting, please contact Pam Joehler at (406) 444-5386 or send an e-mail to pjoehler@mt.gov. Meeting information is also posted on the subcommittee's website at <http://leg.mt.gov>. Just click on "Committees" and follow the links to the Education and Local Government Committee, Postsecondary Education Policy and Budget Subcommittee.

REVENUE AND TRANSPORTATION COMMITTEE

Nothing Dull Here...On June 13 and 14, the Revenue and Transportation Interim Committee (RTIC) will meet to discuss revenue shortfalls, Montana's oil and gas industry, .08 blood alcohol concentration (.08 BAC), and legislation for the 2003 session that is being proposed by the Departments of Transportation and Revenue.

RTIC's first order of business on June 13 will be a joint meeting with the Legislative Finance Committee in Room 303 of the Capitol (Old Supreme Court Chambers) at 8 a.m. The committees will learn of their respective and distinct roles in the process outlined in section 17-7-140, MCA, the statute that requires the governor to reduce spending if there is a projected general fund revenue deficit. Subsection (3)(b) of 17-7-140, MCA, discusses RTIC's responsibility:

(3)(b) If the budget director determines that an amount of actual or projected receipts will result in an amount less than the amount projected to be received in the revenue estimate established pursuant to 5-18-107, the budget director shall notify the revenue and transportation interim committee of the estimated amount. Within 20 days of notification, the revenue and transportation interim committee shall provide the budget director with any recommendations concerning the amount. The budget director shall consider any recommendations of the revenue and transportation interim committee prior to certifying a projected general fund budget deficit to the governor.

After the joint meeting with the Finance Committee, RTIC will reconvene in Room 152 to review legislation being proposed by the Department of Transportation for the 2003 session. MDT staff will also report on the status of the highway special revenue fund.

At the April meeting, RTIC members requested additional information about the .08 BAC federal requirements. Answers to questions posed by committee members will be provided following MDT's presentation.

RTIC also asked that a representative of the Board of Oil and Gas report on the "general health of the oil and gas industry in Montana". Tom Richmond of the Board's Billings headquarters is scheduled to provide that information late Thursday morning.

Thursday afternoon, the Department of Revenue will present its legislative proposals for the 2003 session as well as discuss other activities. The department will also provide a POINTS progress report to the full RTIC as well as to members of the POINTS Subcommittee that includes members from the Legislative Audit and Finance Committees. The POINTS Subcommittee will then convene upon RTIC's adjournment late Thursday afternoon.

Friday morning, RTIC will formally review the revenue estimates submitted by the governor's budget office, as provided in 17-7-140, MCA, and will provide comment and recommendations.

Those on RTIC's mailing list can expect to receive meeting notification and a draft agenda during the first week of June. If you have any questions about RTIC's activities or the upcoming meeting, please contact Leanne Kurtz, RTIC staff, at 444-3064 or via e-mail at lekurtz@mt.gov.

LEGISLATIVE COUNCIL

Council to Meet in June... The Legislative Council is scheduled to meet at 10 a.m. on Monday, June 24 in Helena. Agenda items include the review of proposed executive branch agency legislation, 2005 biennium budget proposals, and proposed Council

legislation. For more information, contact Lois Menzies at (406) 444-3066 or by e-mail at lomenzies@mt.gov.

CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES COMMITTEE

Committee Meets Two Days in May... On May 14, the committee met jointly with the HJR 1 Subcommittee on mental health issues (see related article below for full coverage). On May 15, Gail Gray, director, Department of Public Health and Human Services discussed the department's current budget woes. She also presented a preliminary list of the department's legislative proposals under the executive planning process for the 2003 Legislature.

Committee to Meet in August... The final CFHHS meeting of the interim is scheduled for August 23. The committee is looking at proposing legislation for the next session and asked staff to provide information on the following issues::

- persons with developmental disabilities and Title 46, chapter 18 regarding criminal procedure and mental disease or defect;
- respite care: wage and hour and lifespan respite;
- SJR 22 Subcommittee proposals for a health care policy interim committee; and
- TANF car program update.

The committee will also review DPHHS legislative proposals that have been approved under the executive planning process. The committee will decide on which proposals it will formally request on behalf of the department to be drafted for introduction in the next session.

If you are interested in being placed on the interested persons list, please contact Susan Byorth Fox, Research Analyst, Legislative Services Division, at (406) 444-3597 or at sfox@mt.gov.

HJR 1 SUBCOMMITTEE ON PUBLIC MENTAL HEALTH ISSUES

Committees Review a Variety of Mental Health Issues... The HJR 1 Subcommittee studying public mental health issues and the Children, Families, Public Health and Human Services Committee met jointly on May 14. The joint committee (committee) reviewed legislative proposals being prepared by state agencies and other groups and agreed upon issues for additional consideration.

The committee considered the issue of a person who is committed to the Montana State Hospital (MSH) as a result of having been found not guilty of a criminal

offense by reason of mental defect or disease. The problem is that this person may be committed indefinitely despite having reached maximum benefit of hospitalization. The period of commitment to MHS may be longer than the sentence received by a person, regardless of mental condition, who is convicted of a similar offense in the criminal justice system. The committee directed staff to look at possible statutory changes related to the length of commitment and to report on the statutory provisions for commitment in other states. Sen. Eve Franklin is the committee contact and Susan Fox is the staff contact.

The committee decided to write a letter to the Montana Supreme Court regarding the impacts of the KGF decision, particularly in regard to the length of time a person may be in a mental health facility without treatment while waiting for the disposition of a commitment hearing. Greg Petesch is the staff contact.

The committee will review the 90-day involuntary commitment to Montana State Hospital (MSH) as opposed to a 6-month involuntary commitment in a community setting and will explore the need for prior commitment for a commitment in a community. Rep. John Esp is the legislative contact and Susan Fox is the staff contact.

The committee requested a bill draft to remove the "sunset" provision of SB 454 that was enacted last session. SB 454 created a multiagency services initiative for children with serious emotional disturbances. The purpose of the legislation was to contain costs and to increase the capacity of communities to serve these children in the least restrictive environment. The legislation is scheduled to terminate June 30, 2003. Sen. Stonington is the committee contact and will be assisted by Jani McCall and Dan Anderson. Susan Fox is the staff contact.

The committee requested a bill draft to continue using alcohol taxes for programs serving people suffering from both mental illness and chemical dependency. The committee requested that 10% of the amount allocated to Department of Public Health and Human Services (DPHHS) be used for dual-diagnosis program funding. The committee also requested that DPHHS and legislative staff research other potential funding sources and report on alcohol tax rates in other states. Sen. Stonington is the committee contact and Lois Steinbeck is the staff contact.

The committee will send a letter to the Veterans' Administration (VA) and to Montana's congressional delegation regarding federal action on emergency subsistence grants and on coordinating VA activities with the state. The letter will also include a request for a needs assessment for Montana veterans. The committee may propose legislation to appoint a veterans' representative to the Mental Health Oversight Advisory Council (MHOAC). The committee will examine the needs of veterans and the available resources for veterans and will review the statutory responsibilities of the Mental Health Ombudsman. Sen. Bob Keenan is the contact and will ask MHOAC to look into these issues as well. Sheri Heffelfinger is the staff contact.

The committee may propose a statutory definition of "mental disease or defect". Greg Petesch is the staff contact and will provide some options for consideration,

including the New York definition that has been cited by the Montana Supreme Court in recent decisions.

Sen. Franklin also asked that all committee legislation should consider including advanced practice registered nurses with a clinical specialty in mental health as appropriate mental health providers.

The committee reviewed staff research regarding the legality of eliminating an individual's right to a jury trial for involuntary commitments to MSH. Staff told the committee that the right to a jury trial must be maintained

MHOAC, DPHHS, and Department of Corrections presented several legislative proposals. The most significant proposals included:

- Instead of a court-ordered commitment to MSH, allow a court to commit an individual to DPHHS or its designated entity for determination of placement during the term of commitment, which may or may not include placement in MSH.
- Develop options that would allow an individual to be treated in an intensive and acute care facility in a community setting rather than be committed to or placed in MSH.
- Allow a legal guardian to apply for admittance of a patient to the Montana Mental Health Nursing Care Center.
- Amend section 46-14-312, MCA, to allow transfer of a person committed to MSH as guilty but mentally ill from a DPHHS commitment to DOC commitment.
- Amend statute to specifically provide that a physical condition for Medicaid parole includes mental health conditions.
- Provide judges the ability to change sentences based on medical conditions, including mental disease.
- Support for provider rate increases.

A representative from the Commitment Law Rendezvous expressed several concerns with the legislative proposals:

- The absence of adequate victim notification and involvement.
- Inadequate training and education of probation officers who work with people with serious mental illnesses.
- The lack of a team approach in assessing individuals being considered for release.
- Inadequate information about an individual's eligibility for services in the community, availability of funding and resources for services, and the time required to complete the federal disability (SSI) process.
- The conflict between the state's prerelease work requirements and the federal disability determination criteria.

The committee also heard public testimony that identified additional issues:

- Develop front-end mental health services in the correctional system, particularly in community jails.

- Look at alternatives that would allow mentally ill persons to be treated locally before they are placed in the correctional system.
- With regard to any changes in the mental health commitment statute, consider the length of time that DPHHS be allowed to make alternative placements in community services and when an individual's status changes as time passes after the court makes its determination
- Consider precommitment process in light of the Montana Supreme Court KGF decision regarding length of time prior to commitment hearing, length of time without treatment, and how to minimize costs to the county
- Provide education for probation and parole officers in order to better manage mental health cases

The committee will continue to monitor the progress of other working groups as they develop and fine-tune recommendations and legislative proposals. Sen. Franklin will be the contact for groups working on changes to the commitment law.

The committee also reviewed the status of the DPHHS budget. The committee focused on mental health expenditures and funding. The committee discussed the "medically fragile" waiver that DPHHS is researching. The waiver is included in the DPHHS plan to reduce expenditures and not exceed 2003 biennium appropriations. The waiver is expected to save \$2.9 million general fund annually. Preliminary plans for the waiver would maintain all Medicaid services for medically fragile persons as defined by the state. Medically fragile would include children and disabled and aged persons. All other Medicaid eligible persons would receive a more limited service package, the details of which have not been finalized. Preliminary plans would eliminate most or all optional Medicaid services, such as prescription drugs, and would place limits on some mandatory services such as physician visits and inpatient hospital stays. The committee requested that Greg Petesch provide a legal review of whether statutory changes would be required to implement the waiver.

Two Day Meeting in August...The next HJR 1 Subcommittee meeting is scheduled for a half day on Aug. 6 and a full day on Aug. 7. The committee will review bill draft requests and finalize its recommendations to the Legislative Finance Committee.

If you have questions or need additional information, please contact Susan Fox at 444-3597 or e-mail at sfox@mt.gov or Lois Steinbeck 444-5391 or e-mail at lsteinbeck@mt.gov.

DISTRICTING AND APPORTIONMENT

Commission Adopts Plan...On May 1, the commission adopted Plan 300, as amended, for legislative districts in the southeast and south-central regions of Montana. The amendments affected Chouteau, Custer, Treasure, Powder River, Rosebud, Big Horn, Yellowstone, and Carbon counties. The plan numbering has been variable so the adopted district numbers are the operative numbers currently. The regional plans and the

legislative districts adopted to date can be found on the commission website. (See below for the web address and link). The commission has completed 44 house districts with the adoption of these regional plans.

Additional Meetings and Activities...The commission held public hearings on May 21 in Bozeman and Butte, and on May 22 in Helena. The southwest region completes approximately 72 house districts statewide. The commission will accept written testimony on these plans until June 12, 2002, and make its decision on this region on June 17 in a public meeting in Helena.

The next region to receive staff visits will be counties in western Montana. The commission will hold public hearings on August 12 in Kalispell, and on August 13 in Pablo and Missoula. After accepting testimony for a three-week period, the Commission will tentatively adopt a plan for this region on September 16, completing the 100th proposed house district.

Senate pairings will take place after the November general election, and a public hearing will be held in mid-November. A final public hearing on all 150 house and senate districts will be held in Helena in early December. The plan will be submitted to the Legislature by the 10th legislative day and the Legislature has 30 days to comment. The commission then has 30 days to finalize the redistricting plan and submit it to the Secretary of State, at which time it will become law. These districts will be in effect for the 2004 election.

Maps of the house districts tentatively adopted by the commission and all of the proposed regional maps for the north-central, northeast, southeast, south-central, and southwest regions of the state are available through the "Redistricting" link on the legislative website (leg.mt.gov). Maps of the western region will be available by August 1.

Public Comment Solicited...Please send any written testimony to Susan Fox, Legislative Services Division, who will distribute the information to all commissioners and preserve the original for the file. The commission will not make any decisions on plans until after the deadline for written testimony has passed. For more information or to be placed on the commission's interested persons list, please contact Susan Byorth Fox, Legislative Services Division, P.O. Box 201706, Helena MT 59620-1706, or by phone at (406) 444-3597, or by e-mail at sfox@mt.gov.

TRANSITION ADVISORY COMMITTEE

Committee Meets in Great Falls...The Transition Advisory Committee met April 25 and 26 in Great Falls. The Universal Systems Benefits Programs and the Transmission subcommittees met on the first day and the full committee met on the second day. The committee also met Thursday evening to field questions from the public about energy issues.

USBP Subcommittee Adopts Recommendations... The Universal System Benefits Programs (USBP) Subcommittee met on April 25 in Great Falls. The TAC is statutorily required to make recommendations regarding the ongoing need and funding level of USBP by July 1, 2002. In response to those statutory requirements, the TAC created the USBP Subcommittee. The subcommittee reviewed a lot of information regarding USBP at two separate meetings. The subcommittee took public comment and heard the governor's position on the need for USBP. A representative of the governor said that there is a need to continue USB programs at the current funding level and that any unspent USB program money that comes into the state should be reallocated to the service territory from which the money was received. The subcommittee unanimously made the following findings and recommendations to TAC regarding USB programs:

- The subcommittee finds that fledgling markets exist for certain types of efficiency and alternative energy applications; however markets do not exist for low-income energy assistance.
- The subcommittee finds that there is an ongoing need for USB programs.
- The subcommittee finds that the current level of funding (2.4% of the 1995 value of utility retail sales) for USB programs is adequate at the.
- The subcommittee supports the governor's recommendations that:
 - (a) any USB program money deposited in state special revenue accounts be expended in the utility service territory from which the money was received; and
 - (b) in assessing USB program funding needs, the state agencies administering the funds be required to solicit utility and public comment from the utility service territory from which the money was received.
- The subcommittee recommends adoption of draft legislation implementing the governor's recommendations.
- The subcommittee recommends that the USB program statutory allocation for irrigation funding mechanism be revisited and made more flexible to meet the realistic needs of the utility and its customers.

On April 26, TAC adopted all of the USBP Subcommittee recommendations. The subcommittee has completed its assigned work and is not scheduled to meet again. If you have questions about the recommendations, contact Todd Everts at (406) 444-3747, or by e-mail at teverts@mt.gov.

Transmission Subcommittee... For the last two meetings, the Transmission Subcommittee has been looking into the implications of FERC (Federal Energy Regulatory Commission) Order 2000 that requires utilities operating in the various regions of the country to form regional transmission organizations. Representatives from NorthWestern Energy, the Bonneville Power Administration, and electrical generators have been assisting the subcommittee in its review of transmission system issues.

The purpose of creating a regional transmission organization is to enhance the efficiency of wholesale electricity markets and to ensure that electricity customers in the region pay the lowest price possible for reliable service. The transmission system would be operated by a single entity and would provide open access to the system. RTO West would be the operator in the Pacific Northwest, including most of Montana. RTO West would be designed to avoid cost shifts associated with transmission tariffs, eliminate multiple rates assessed against the transmission of electricity (pancaking), and honor existing contracts.

The subcommittee is concerned that the state's electricity customers may be hurt by the creation of RTO West, that is, the costs faced by customers of the new system may exceed the benefits. They are also worried that the state could lose control with the new system.

John Hines (Northwest Power Planning Council), Ted Williams (NorthWestern Energy), and Bob Anderson (Public Service Commission) discussed Montana's role in the development of RTO West. The state role is limited because of interstate commerce implications. Anderson said that it is unclear whether the PSC has authority to assert jurisdiction over NorthWestern's participation in RTO West. Matthew Brown, National Conference of State Legislatures, pointed out that states have authority over transmission siting, the distribution system, power system planning, collaboration with stakeholders in the region, and taxation.

Meeting Scheduled for July 11: The subcommittee is scheduled to meet July 11 in Helena. The subcommittee will look at issues and options for dealing with the RTO West concept. For more information about the subcommittee, contact Jeff Martin at (406) 444-3595 or by e-mail at jmartin@mt.gov.

Full Committee Reviews Implications of Voter Rejection of HB 474... Todd Everts presented a legal analysis of the implications if Montana voters reject House Bill 474 at the general election in November. House Bill 474, adopted at the end of the 2001 legislative session, generally revised electrical industry restructuring. The legal analysis was the catalyst that led to the committee adopting several preliminary recommendations in the event HB 474 is rejected:

- extend USBP funding through December 31, 2005;
- allow large customers to enter and exit the default supply system;
- extend the customer choice transition period to June 30, 2007; and
- retain the provisions related to electric buying cooperatives under 35-19-104, MCA.

The Committee also adopted preliminary recommendations to revise the legislation in the event HB 474 is approved by the voters:

- eliminate low interest loans provided by the Board of Investments for building coal generation plants; and
- repeal the Montana Power Authority.

Other Topics: Matt Brainard, PSC, reported on the Public Service Commission's review of the default energy supply portfolio. Bill Pasco, NorthWestern Energy, compared

residential rates under the default supply portfolio with rates imposed by rural electric cooperatives and by other utilities in the region. Matthew Brown presented a progress report on his study of restructuring of the electrical utility industry in Montana. Finally, the committee voted to recommend that the Legislative Council include the committee in the general fund appropriation for the Legislative Services Division. Since enactment of the original restructuring legislation, the committee has been funded by donations from private entities.

Committee to Meet in July: The next TAC meeting is scheduled for Friday, July 12. Contact Jeff Martin at (406) 444-3595 or at jmartin@mt.gov for more information about the committee.

DEAR MASON AND ROBERTS

Dear Mason and Roberts: In the process of trying to quash a quarrel with one of my querulous contemporaries, who is a quipster and claims that I am a quack, I have come to quietly question the quality of my knowledge about quorums. I am quick to note that these may not be the quintessential queries about quorums, but I don't think that they are too quirky. I'm wondering if you would be so kind as to grab a quill and pen a few quality answers to quench my thirst for knowledge. A quesadilla and a quaff are riding on your answer to question number 1. No need to quantify your answers--I promise not to quote you!

Sincerely,
Rep. Quincy Quixote

Dear Representative Quixote: It is obvious to us that you are quick-witted and that you are no quitter, and we have no qualms about taking your quaint quiz. We hope that the following answers will quell your concerns and assist you in your quest for information.

Q: What is a quorum, and why is it important?

A: A quorum is the minimum number of members required to be present before a deliberative body may transact business. Without a quorum, the body cannot take action. In the Senate and House, a majority of each house (i.e., 26 senators, 51 representatives) constitutes a quorum (Montana Constitution, Art. V, sec. 10, Senate Rule 60-30, House Rule 50-20).

Likewise, for Senate and House standing committees, a majority of the committee members constitutes a quorum (Mason's Manual of Legislative Procedure (Mason's), sec. 613, House Rule 30-30). For example, 11 members constitutes a quorum for a 20-member committee, while 6 members are needed for an 11-member committee to take action.

The House Speaker and the House and Senate majority and minority floor leaders are ex officio, nonvoting members of all standing committees within their

respective chambers. These officers may count toward establishing a quorum. (Senate Rule 30-40, House Rule 30-30)

Note that in joint committees, those composed of both Senate and House members, a quorum is a majority of the joint committee's combined membership (Mason's, sec. 655). However, because the Joint Rules Committee and conference committees are joint meetings of separate committees, a quorum is a majority of the members of each committee (Joint Rule 30-20, Mason's, sec. 770).

Q: I know that a quorum is needed before we may take executive action on a bill before a standing committee. But may we hear testimony, ask questions, and discuss a bill without a quorum present?

A: Yes, these activities are allowed without a quorum present (Mason's, sec. 613).

Q: If a committee member has given his or her proxy to another member, does the proxy vote count for purposes of a quorum?

A: No. Only members present may be counted toward establishing a quorum (Mason's, sec. 503).

Q: If a bill is approved on second reading and later it's discovered that a quorum wasn't present at the time of the vote, is the action taken on the bill valid? If this same situation occurs on third reading, is the action valid?

A: The action taken on second reading is valid because it is a preliminary vote that does not finally dispose of the bill. According to Mason's, when an action has been completed, it is too late to raise a question or point of order that no quorum was present (Mason's, sec. 505). However, the action taken on third reading is not valid because it is the final disposition of the bill in that house, and the Montana Constitution provides that a bill may not become law except by a vote of the majority of all members present and voting (Art. V, sec. 11).

Q: I've heard about a procedure for compelling attendance of members when no quorum is present in the Senate or House. Tell me about it, please.

A: You are referring to a parliamentary device known as a call of the Senate or House in absence of a quorum. The right of the Senate and House to compel attendance of absent members is guaranteed by the Montana Constitution (Art. V, sec. 10).

A motion for a call of the Senate without a quorum present may be made on any order of business except: (1) during a roll call (Mason's, sec. 194) or (2) after the previous question has been ordered unless it appears upon actual count by the presiding officer that a quorum is not present (Senate Rule 50-80). In the House, the motion is in order whenever it has been established that a quorum is not present (House Rule 50-30). In both houses, the motion may not be debated or amended (Mason's, sec. 194, House Rule 50-30). A majority vote is needed to approve the motion (Senate Rule 50-200, House Rule 50-30).

Following approval of a call of the Senate or House, the doors of the chambers may be closed and a roll call taken. A list of the absent members is given to the sergeant-at-arms with instruction to bring in the absentees (Mason's, sec. 195).

In the Senate, any member who refuses to attend may be arrested by the sergeant at arms or any other person as directed by the majority of senators present. When the member is brought in and the Senate refuses to excuse the member's absence, the senator may not be paid any expense payments while absent and may be charged for expenses incurred in bringing in the member (Senate Rule 50-200). Likewise, a House member may be required to pay any costs incidental to securing the member's attendance (Mason's, sec. 195).

In the House, a member with an overriding medical or personal reason may request a leave with cause. If the member is present at the time of the call, the Speaker may approve this request. If the member is not present, two-thirds of the members present and voting may approve the request for leave (House Rule 50-50).

During a call of the Senate or House, all business is suspended, and no motion is in order, except for a motion to adjourn or to remove the call. The call is automatically lifted when a quorum is achieved. It also may be lifted by a two-thirds vote of the members present and voting or by adjournment (Senate Rule 50-200, Senate Appendix A (2), House Rules 50-30 and 50-150).

Q: Sometimes a quorum is present on the floor, but there are still quite a few members missing. May a call of the Senate or House be made when a quorum is present?

A: Yes. When a quorum is present in the Senate, a motion for a call of the Senate may be made on any order of business except: (1) during a roll call (Mason's, sec. 194) or (2) after the previous question has been ordered unless it appears upon actual count by the presiding officer that a quorum is not present (Senate Rule 50-80). In the House, the motion is in order at any time a vote is not being taken, except that the motion may not be made with a quorum in the Committee of the Whole (House Rule 50-40). The motion may not be debated or amended (Mason's, sec. 194, House Rule 50-40) and requires the approval of five members in the Senate and one-third of the members present and voting in the House (Senate Rule 50-200, Senate Appendix A (1), House Rules 50-40 and 50-150).

During a call of the Senate or House, all business is suspended, and no motion is in order, except for a motion to adjourn or to remove the call. The call is automatically lifted when all members, except those on leave with cause in the House, are present. It also may be lifted by a two-thirds vote of the members present and voting or by adjournment. (Senate Rule 50-200, Senate Appendix A (2), House Rules 50-40 and 50-150)

Q: Let's say that we are in the Committee of the Whole, and it doesn't seem as if a quorum is present. How may I bring this situation to the attention of the presiding officer without compelling attendance through a call of the house?

A: You may do so by rising to a question or point of order suggesting that a quorum is not present. In the Senate, the question of no quorum may be raised at any time. The question is decided by the presiding officer and is subject to appeal (Mason's, sec. 504). In the House, a member may question the lack of a quorum at any time that a vote is not being taken. The question may not be debated or amended and is resolved by a roll call vote. (House Rule 50-20)

Do you have rule questions that you would like us to cover in this column? If so, send them to Lois Menzies, Legislative Services Division, PO Box 201706, Helena, MT 59620-1706 or lomenzies@mt.gov.

TIME AND TIDE

<u>Event</u>	<u>Days remaining</u>
Target date for completion of interim committee work (September 15, 2002)	107
General election (November 5, 2002)	158
58th Legislature convenes (January 6, 2003)	220

BACK PAGE

THE NEW TRAIL OF TEARS: Broken Promises and Broken Trust

By Connie Erickson
Legislative Research Analyst

INTRODUCTION

American Indian tribes are a unique group within American society. While they compose a minority of the United States' population, the legal status of tribes, unlike African Americans or Hispanics, is not based on race. Rather, it comes from the fact that since preconstitutional times, Indian tribes have always been recognized and treated as distinct, independent political communities.

Although Indians are citizens of the United States and of the states where they reside, they are also members of a tribe and are subject to a tribal government if they reside on a reservation. State governments exercise some jurisdiction within the boundaries of an Indian reservation, but that jurisdiction is limited.

How Indian tribes attained this unique position in American society is a function of history and of federal Indian policy--a policy that has vacillated between regarding tribes as sovereign equals and attempts to terminate tribes. This policy vacillation has had tremendous impacts on tribal governments as well as individual Indians. In fact, it was the policy of allotment and assimilation dating back to 1887 that is having tremendous impacts on American Indians today and is the genesis of this report.

A BRIEF HISTORY

By 1887, American Indian tribes, for the most part, were confined to reservations west of the Mississippi River. This confinement, with the accompanying dependance on government largesse, resulted in a situation of hopeless poverty. This poverty spurred critics of federal Indian policy to call for reforms not only to alleviate the poverty but to also create a new role for Indians in American society. Moreover, the idea of large tracts of land being excluded from white settlement bred resentment among many non-Indians.

Indian poverty and non-Indians' desire for land spurred the development of a new federal Indian policy: assimilation. The components of this policy were allotment, education, and citizenship. Each component was designed to force Indians to assimilate into white society by breaking up tribal governments, which were viewed as obstacles to the cultural and economic development of Indians.

Within the context of Indian policy, allotment meant the assignment of reservation land to individual Indians. It was believed that allotment would promote an agricultural lifestyle among Indians while opening up more land for white settlement. As early as 1633, Indian

lands had been allotted. Early treaties reserved some lands for ownership by individual Indians or families. Tribal ownership of lands was sometimes converted into ownership with title held by individual tribal members. These early attempts failed as allotted land quickly passed from Indian allottees into the hands of non-Indian traders and land companies, often by means of fraud.¹

In 1887, the U.S. Congress passed the Indian General Allotment Act, often referred to as the Dawes Act, which called for all reservation lands to be surveyed and then allotted to individual Indians to farm. The first allotment consisted of 160 acres to each head of household and 40 acres to each minor. This was later amended to give 80 acres of agricultural land or 160 acres of grazing land to each Indian.² Title to the allotted land was held in trust by the federal government for a period of 25 years. At the end of the trust period, the Indian allottee was given free and clear title to the land. However, during the trust period, the federal government assumed full responsibility for the management of the trust land. This responsibility included arranging leases and collecting and disbursing to the Indian allottees all revenues generated by mining, oil and gas extraction, timber operations, grazing or other similar activities on the allotted lands.

The policy of allotment was a dismal failure. From the passage of the Dawes Act to 1934 when allotment ended, 90 million acres of Indian land were lost.³ Allotment resulted in separating Indians from their land without accomplishing the benign purposes intended by its supporters.

In 1934, the federal government's Indian policy took another turn. In that year, Congress passed the Indian Reorganization Act (IRA), also known as the Wheeler-Howard Act. The purpose of the IRA was to encourage economic development, self-determination, cultural plurality, and a revival of tribalism. The IRA ended the practice of allotment and indefinitely extended the trust period for those allotments still in trust. This meant that the federal government, specifically the Bureau of Indian Affairs (BIA), would continue to manage the trust land for Indian allottees.

In theory, the management of the trust lands works like this. The BIA issues leases or allows other revenue-generating activities on individual Indian trust land. All of the revenue generated by leases or other activities is collected by the BIA and held in the Individual Indian Money (IIM) Trust and credited to an individual IIM trust account holder. The BIA is responsible for maintaining complete and accurate land and title records for all of the trust land and for disbursing the revenue to the account holders on a regular

¹Rennard Strickland, ed., Felix S. Cohen's Handbook of Federal Indian Law, 1982 ed. (Charlottesville, Virginia: The Michie Company, 1982), p. 130.

²Ibid., p. 133.

³Ibid., p. 138.

basis. In reality, Indian allottees are never told who leased their land or for what purpose, how much the lease was for, or how long the lease runs. Sporadically, allottees receive a check from the BIA with no accounting or explanation of any kind.⁴

In 1928, The Commissioner of Indian Affairs issued the Meriam Report that documented the failure of federal Indian policy during the allotment period. One of the problems identified in the report was the severe mismanagement of the trust accounts. Records were poorly kept or were nonexistent. Money was misappropriated, stolen, or never collected. Although the Meriam Report led to many positive changes in federal Indian policy, including the IRA, the problems with the trust accounts were not addressed. Over the years, various congressional reports continued to point up problems but little if anything was done to correct the abuses.

BROKEN PROMISES ON THE BLACKFEET RESERVATION

Elouise Cobell is a member of the Blackfeet Indian Tribe who was born and raised on the desolate, windswept plains of the Blackfeet Reservation in northwestern Montana. Raised in a home with no plumbing, electricity, telephone, or running water, Cobell remembers as a child her parents, grandparents, and other tribal elders wondering where their money was from their trust lands or why the sporadic checks that did come were less than they should have been. No one knew the answers. Moreover, Indians were reluctant to ask BIA officials because they feared the power the BIA wielded on the reservation.

The memories of Cobell mirror the experiences of other Blackfeet. Suzie White Calf, an 81-year old tribal member, knows that she has an allotment somewhere on the Blackfeet Reservation, but she doesn't know where, who is leasing it, what resources it holds, or how much revenue it generates. Five years ago, White Calf needed a loan from the BIA to cover funeral expenses for her husband. To repay the loan, money is withheld from her monthly lease check. However, because she is unable to get an accurate accounting of how much she is entitled to each month, she doesn't know when the loan will be paid off.⁵

Tiffany Morris, a teenaged Indian woman who lives near Starr on the Blackfeet Reservation, is the only wage earner in her family. Her father is disabled but would like to have access to the land he owns. However, it is currently being leased to an oil company and generates an income of 18 cents a month. Morris wonders about the inequities when she watches the oil well on her dad's land pumping oil every day and yet her dad needs to borrow gas money from her.⁶

⁴Peter Maas, "The Broken Promise," Helena (Montana) Independent Record, 9 September 2001, Parade Magazine, p. 5.

⁵Sara Bullard, "Broken Trust: A Report from Blackfeet Country," Ford Foundation, Fall 2000, p. 3.

⁶Ibid.

The Blackfeet are not the only ones suffering from the mismanagement of the trust funds by the BIA. All across Indian country are countless stories of Indians living in abject poverty while their land produces income.⁷

In 1976, Cobell was appointed treasurer of the Blackfeet Tribe. She had graduated from the Great Falls Business College and had attended Montana State University, so she had accounting experience. As treasurer, Cobell began questioning how the BIA was handling the investment of Blackfeet tribal trust funds. When she sought answers to her questions she was rebuffed and often humiliated by local and regional BIA officials. She eventually took her questions to the Department of the Interior, of which the BIA is part, in Washington, D.C. What she found out was that the Department had no accounting system in place to track transactions. No one knew who was paying and who wasn't.

She also discovered that she was not the only one concerned about mismanagement at the Department. In 1989, Representative Mike Synar of Oklahoma began working with the Congressional Budget Office to sort out the problems and to find solutions. Very little was accomplished, and so in 1994, Representative Synar persuaded Congress to authorize the appointment of a special trustee to provide a full accounting of the money owed to Indian allottees and to oversee reform of the trust system. Unfortunately, the special trustee was not given autonomy to do his work but was answerable to the Secretary of the Interior, who at that time was Bruce Babbitt. Secretary Babbitt refused to cooperate with the special trustees and eventually stripped him of what little authority he had.⁸ Within 5 years, the special trustee resigned.

In the meantime, Cobell tried to meet with Babbitt and with Attorney General Janet Reno to voice her concerns and register her complaints. Both officials refused to meet with her, even after agreeing to a meeting, and shuffled her off to lesser officials whom she felt treated her shabbily.⁹ At that point, Cobell decided that a lawsuit was the only remaining option.

COBELL V. BABBITT

On June 10, 1996, Elouise Cobell and four other American Indians filed a complaint in U.S. District Court in Washington, D.C. against the Departments of the Interior and the Treasury seeking reform of the IIM trust system and a full accounting of the money supposedly held in the trust. It was a class action suit representing 500,000 American Indians. Judge Royce Lamberth divided the case into two phases. Phase One called for

⁷Ellen Nakashima and Neely Tucker, "Lost Trust: Billions Go Uncounted; Indians in Century-Old Fight to Tally Money Owed for Land Use," Washington Post, 22 April 2002, sec. A, p. 1.

⁸Maas, "The Broken Promise," p. 6.

⁹Ibid.

the reform of the trust system. Phase Two would be the accounting for the money. During the pretrial phase, Judge Lamberth ordered Interior and Treasury to produce trust-related documents for the five plaintiffs. Two years later, the Judge ordered the Departments for a second time to produce the relevant documents and materials. Although government attorneys told the Court that Department officials were searching for the records, in reality, both Interior and Treasury were systematically destroying records. Between November 1998 and January 1999, Treasury officials destroyed 162 boxes of documents stored in a government warehouse in Maryland.¹⁰ The destroyed records included ledgers listing transactions and disbursements and records of uncashed checks--some 100 years old--that never reached their intended Indian recipients. As a result of their failure to produce the ordered records, Interior Secretary Babbitt, Treasury Secretary Robert Rubin, and Assistant Interior Secretary Kevin Gover, head of the BIA, were found in contempt by Judge Lamberth. Four months later, when government lawyers notified the Court of the destroyed Treasury documents, Judge Lamberth fined Interior and Treasury \$625,000 for failure to report the records destruction in a timely manner.

Phase One of Cobell v. Babbitt finally went to trial on June 10, 1999, 3 years after the case was originally filed. The actual trial lasted about 5 weeks. Before rendering his decision, however, Judge Lamberth appointed a mediator to try and settle the case. After 2 months of trying to work with both sides to resolve the issues in the case, the mediator reported to the Court that there was no possibility that mediation would lead to a settlement. Therefore, on December 21, 1999, Judge Lamberth issued his opinion on Phase One. The Court found that the federal government had breached its statutory trust responsibilities to American Indians and had no written plans to bring itself into compliance. The Court ordered both Treasury and Interior to establish written policies and procedures to rectify the breaches of trust. These policies and procedures were to address;

- (1) the collection of missing information from outside sources;
- (2) the retention of IIM-related trust documents;
- (3) computer and business systems architecture; and
- (4) the staffing of the trust management functions.¹¹

Furthermore, the Court retained jurisdiction over the trust system for 5 years and ordered Interior and Treasury to file quarterly reports detailing their efforts to rectify the breaches of trust and to bring themselves into compliance with their statutory trust duties.

As expected, the federal government appealed the decision. During the appeals process, both Interior and Treasury continued to destroy documents and e-mail records ordered preserved by the Court. Interior was also charged with retaliating against an Interior

¹⁰*Ibid.*

¹¹*Cobell v. Babbitt*, 91 F. Supp. 2d 1, 58 (D.D.C. 1999).

employee who testified that another Interior official had given false testimony during the trial regarding the Department's new data management system that was defective.¹²

COBELL V. NORTON

On January 20, 2001, George W. Bush was inaugurated President of the United States. With a change in the presidency came a change in Cabinet members. Gale Norton, former Attorney General of Colorado, was appointed Secretary of the Interior. Cobell v. Babbitt became Cobell v. Norton.

On February 23, 2001, the U.S. Court of Appeals issued its decision upholding Judge Lamberth's 1999 decision. In its decision, the Court of Appeals stated that "the magnitude of the government's malfeasance" justified continued Court supervision and oversight of the government's failed attempts at trust reform.¹³ Within 2 months of the decision, Judge Lamberth appointed Joseph Kieffer III as a Court Monitor to oversee trust reform and to report to the Judge on Interior's progress in implementing reform. Kieffer's periodic reports continued to criticize Interior for failure to make progress. He cited mismanagement by senior Interior officials and stated that the Court-ordered quarterly progress reports "failed to provide a truthful, accurate, and complete picture of the status of reforms."¹⁴

On May 25, 2001, Secretary Norton and Secretary of the Treasury Paul O'Neill let the deadline pass for asking for a review of the Court of Appeals decision by the U.S. Supreme Court. Responsibility for complying with the 1999 Lamberth decision now fell squarely on the shoulders of Secretary Norton and newly-appointed Assistant Secretary for Indian Affairs Neal McCaleb.

Based primarily on the reports of Kieffer, Judge Lamberth, on November 28, 2001, ordered Secretary Norton and Assistant Secretary McCaleb to stand trial for contempt for failing to reform the trust system. In the meantime, Secretary Norton announced her proposal for managing the Indian trust assets. Secretary Norton proposed the creation of a new bureau within the Department of the Interior called the Bureau of Indian Trust Assets Management (BITAM) that would be completely separate from the BIA and headed by an Assistant Secretary. To head the BITAM, Secretary Norton tapped Ross Swimmer, former head of the BIA under President Ronald Reagan. Seven tribal consultation meetings were scheduled across the country to seek tribal response to the proposal. The proposal met with immediate opposition from tribal leaders all across the nation. Their

¹²*Cobell v. Babbitt: Case Chronology*, available from <http://www.indiantrust.com/chrono.cfm>; Internet; accessed 28 March 2002.

¹³*Cobell v. Norton*, 240 F. 3d 1081, 1109 (U.S. App. D.C. 2001).

¹⁴Bill Miller, "Indian Trust Reform Still Mired, Watchdog Says Receivership Urged for Interior Programs," Washington Post, 18 September 2001, sec. A, p. 29.

opposition was two-fold. First of all, they were upset that the proposal had been fashioned without any input from or consultation with Indian tribes. Second, the tribes viewed this move to create a new bureau as the first step in weakening the BIA. Despite historical complaints about the BIA, the agency is seen in Indian country as the symbol of the federal government's commitment to tribal sovereignty. Tribes fear that if the trust management responsibility is taken away from the BIA, other BIA functions, such as schools and roads, will be easily subsumed by other federal agencies. This would leave no single federal agency responsible for Indian affairs. Because of tribal opposition, Congress directed Secretary Norton to slow down implementation and to schedule additional tribal consultation meetings. A tribal task force has also been formed to develop alternatives.

Despite the efforts of Secretary Norton to comply with the Court decision, problems persisted at Interior. Last fall, Court Monitor Kieffer discovered that computer security at Interior was so lax that second-rate hackers could break into the computer system, set up trust accounts, and make adjustments to the accounts without detection. Judge Lamberth immediately ordered Interior to disconnect the trust accounts from the Internet until better security was in place. What resulted from this order was a complete shutdown of the entire Department of the Interior website, including the e-mail system and access to websites for national parks and other Interior programs.

On December 10, 2001, the contempt trial for Secretary Norton and Assistant Secretary McCaleb began. The trial concluded on February 21, 2002, but Judge Lamberth has yet to issue a decision.

CAN THE BROKEN TRUST BE REPAIRED?

Exactly how bad are the problems with the IIM trust? During the original trial, the following facts were revealed. There are over 40,000 IIM trust accounts with beneficiaries that cannot be contacted because of inadequate addresses. More than 5,500 accounts exist for minors who have actually reached legal age. At least 123,000 accounts lack a Social Security number or a tax I.D. number. There is a probate backlog of about 12,000 cases, and there are 212,000 title defects because of an appraisal backlog.¹⁵ Plaintiffs estimate that over the years \$10 billion has been lost by the Department of the Interior.¹⁶ Estimates of the amount of money due to Indian beneficiaries range from \$20-\$40 billion.¹⁷

¹⁵Cobell v. Babbitt at 17-18.

¹⁶Robert Gehrke, "Trust Fund Suit Alleges Problems," Associated Press, 24 February 2002.

¹⁷Maas, "The Broken Promise," p. 6.

Over 2 years later, the problems still exist and, in some cases, have been exacerbated.¹⁸ A recently-completed audit by KPMG has identified \$67 million in trust funds held by the Department of the Interior for Indian beneficiaries who cannot be properly identified. The number of "whereabouts unknown" accounts has risen to 62,000. There is a \$33 million discrepancy between Interior's Indian Trust Fund cash balances and what Treasury reports as cash balances. KPMG also found a negative balance of \$44 in the IIM trust. Furthermore, Interior is unable to provide proper accounting records to support its balances or reconcile discrepancies.

Of special concern in both Cobell and the KPMG audit is the status of the "special deposit accounts". A special deposit account is a holding account within the IIM trust system in which money is deposited for various reasons. For example, performance bonds, administrative fees, or money subject to some contingency are deposited in special deposit accounts. In some instances, money that should be paid into an individual IIM trust account may be held temporarily in a special deposit account while the BIA reviews the ownership and lease file to determine if the file is up-to-date. Once this determination is made, the funds are released from the special deposit account into the individual IIM trust account. Interior has never given a proper accounting for these special accounts, even though many of them hold in excess of \$1 million. According to KPMG, many of these accounts have remained inactive for several years while new accounts continue to be established. The lack of accounting opens up the possibility that some of these special deposit accounts could be eliminated without anyone's knowledge.

Records have been kept in boxes in barns and sheds or piled in trailers. They have been shredded, burned, or crumbled from age. Rat droppings have contaminated some records with hantavirus. When more room was needed, older records were simply discarded.

During her contempt trial Secretary Norton stated that a complete accounting of all of the money Indians should have collected would cost hundreds of millions of dollars and may be impossible because documents have been lost or destroyed.

The shutdown of the Interior Department's computer system has resulted in the inability of the Department to issue royalty checks to individual Indians who rely on the income for their very survival. Since the shutdown, it is estimated that the federal government is \$15 million in arrears in payments owed to 43,000 Indians.¹⁹ The Department has begun to issue checks, but to only a small percentage of Indians and for only about half of what they are owed. Moreover, Interior is proposing to rid the system of about 18,000 inactive

¹⁸"Indian Beneficiaries Being Denied Millions," available from http://www.indiantrust.com/clips.cfm?news_id=218; Internet; accessed 15 April 2002.

¹⁹"Interior's Shabby Mess," Denver Post, editorial, 3 March 2002.

IIM trust accounts, even though Interior is unable to provide a complete and accurate accounting for any of its trust accounts.²⁰

The U.S. Senate Committee on Governmental Affairs ranked the IIM trust fiasco as Number 2 in the government's "Top 10 Worst Examples of Mismanagement", exceeded only by the "Big Dig" highway project in Boston.²¹

Secretary Norton's BITAM proposal is currently on hold until the end of the consultation and comment period, which is June 30, 2002. In the meantime, other reform proposals have been put forth by various groups and individuals. Elouise Cobell and the other plaintiffs would like to see Judge Lamberth place the IIM trust accounts into the care of a Court-appointed receiver with professional experience and under the supervision of the federal Court.

Paul Homan, former special trustee in charge of trust reform, advocates the creation of a Resolution Trust Corporation-style entity for a set period of time to resolve the problems. Once the problems are resolved and the records system is modernized, the BIA can reassume control.

Senators John McCain, Tim Johnson, and Tom Daschle have introduced legislation (S. 2212) to create an Office for Trust Management and Reform, headed by a Deputy Secretary, in the Department of the Interior. Titled the "Indian Trust Asset and Trust Fund Management and Reform Act of 2002," S. 2212 would also make it easier for tribes and beneficiaries to directly manage or co-manage their own trust funds, pursuant to the Indian Self-Determination Act.

Tribes fear removal of the trust management from the BIA because they believe that it would provide grounds for terminating the government's trust relationship with the tribes. Cobell argues that a receivership would not damage the trust relationship because the government would still manage the trust; it would just be the judicial branch instead of the executive branch. In addition, the receivership would not be a permanent arrangement.

The Montana and Wyoming Indian tribes have proposed a consolidation of all of the trust functions within the BIA under a Commissioner for Tribal Trust Management. This commissioner would be guided by a Tribal Trust Advisory Board made up of tribally designated representatives.

All of these proposals are on hold awaiting the decision of Judge Lamberth in the Norton-McCaleb contempt trial. No one knows for sure when that decision will be forthcoming. In addition, a trial on Phase Two of Cobell, accounting for the money, has yet to be scheduled.

²⁰"Indian Beneficiaries Being Denied Millions."

²¹Maas, "The Broken Promise," p. 5.

It has been almost 120 years since the federal government began managing the trust assets for American Indians. During that time, there have been repeated reports of abuse and mismanagement of trust funds. Anecdotal evidence of individual Indians denied access to money that is rightfully theirs abounds. It took a Blackfeet woman to finally stand up and demand an accounting from the federal government. It has been 6 long years since Elouise Cobell and four other plaintiffs filed suit against the Departments of the Interior and Treasury. Although the case is far from over, attention has finally been focused on the abuse and mismanagement. Hopefully, the federal government will finally accept responsibility for its transgressions and make a good faith effort to repair the broken trust.



INTERIM CALENDAR

UNLESS OTHERWISE SPECIFIED,
ALL ROOM DESIGNATIONS ARE IN THE CAPITOL BLDG.

JUNE

June 3-4, Law and Justice Committee, Room 102

June 12, SB 162 Subcommittee on Review of Revenue Dedicated to Local Government,
Room 137, 1:15 p.m.

June 13, Legislative Finance Committee, Room 303, 8 a.m. (tentative)

June 13, Revenue and Transportation Committee, Room 303, 8 a.m.

June 13, SJR 22 Subcommittee on Health Care and Health Insurance

June 14, Legislative Finance Committee, Room 303, 8 a.m. (tentative)

June 14, Revenue and Transportation Committee, Room 152

June 14, Economic Affairs Committee, Room 137

June 17, Legislative Audit Committee, Room 102

June 24, Legislative Council, Room 102, 10 a.m.

JULY

July 9, Postsecondary Education Policy and Budget Subcommittee, Rm. 102, 10 a.m.

July 11, TAC Transmission Subcommittee

July 12, Transition Advisory Committee

July 29, Environmental Quality Council subcommittees

July 30, Environmental Quality Council